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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
3 -----x

4 UNITED STATES OF AMERICA,

5 v.

10-CR-918 (RPP)

6 VADIM CHERVIN,

7 Defendant.

Oral Argument

8 -----x
9 New York, N.Y.
10 September 21, 2012
11 10:30 a.m.

12 Before:

13 HON. ROBERT P. PATTERSON, JR.,

14 District Judge

15 APPEARANCES

16 PREET BHARARA

17 United States Attorney for the
18 Southern District of New York

19 JASON P. HERNANDEZ

20 JOSHUA A. NAFTALIS

21 Assistant United States Attorneys

22 FREDERICK H. COHN, ESQ.

23 Attorney for Defendant

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1 (In open court; case called)

2 THE COURT: Is the government ready?

3 MR. HERNANDEZ: Yes. Good morning, your Honor. Jason
4 Hernandez and Joshua Naftalis for the United States.

5 THE COURT: Good morning.

6 MR. COHN: Good morning, your Honor. Fred Cohn for
7 Mr. Chervin, who is here seated by me.

8 THE COURT: Good morning, Mr. Cohn, and Mr. Chervin.

9 THE DEFENDANT: Good morning.

10 THE COURT: This is the defendant's motion.

11 MR. COHN: Your Honor, this motion attempts to
12 recognize what I think is blindness by the judiciary as a whole
13 of the effect of a prior conviction, and in the context of this
14 case, it's a 16-year-old conviction to be used for
15 cross-examination on veracity. It is the age of this
16 conviction which makes it I think subject to intervention by
17 you now. And candidly -- and I mean no disrespect anywhere.
18 You've known me professionally for a long time. There's no
19 judge I respect more. But I think what I'm saying to you, I
20 could probably say to every judge on this bench, and that is
21 that there is a knee-jerk reaction for a conviction to be used
22 for cross-examination, which I think universally means that no
23 judge denies the motion by the government to use it that way
24 or, conversely, no judge grants the motion for the defendant to
25 suppress it. If that's the case, if that's universally true

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1 and if a judge has discretion to not allow the government to
2 cross-examine on that -- and you will remember that the court's
3 decision on the cross-examination drove the tactics on the
4 affirmative use during his -- during the government's case in
5 chief and it's what caused me to argue -- to open on the
6 conviction.

7 THE COURT: My problem throughout the case was: one, I
8 don't know exactly what's going to happen at time of trial --

9 MR. COHN: We told you, Judge --

10 THE COURT: -- and since I don't know what's going to
11 happen at time of trial, I don't like to --

12 MR. COHN: I know that, Judge.

13 THE COURT: -- predetermine what I'm going to do on
14 trial.

15 MR. COHN: And you told us that, and I told -- and you
16 said -- and I think the record will reflect it -- that if he
17 was going to testify and be cross-examined on the conviction
18 and if that was the case, I promised that he would testify and
19 therefore that the government was going to use that on
20 cross-examination, I was going to open on it so that they
21 couldn't use it, because you said that if that was going to
22 happen, you were going to let it in on the direct case. And
23 that's why I opened on it and tried to blunt it as much as I
24 can. But I don't believe -- your Honor, quite frankly, despite
25 all the curative charges that you give and all the goodwill by

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1 the court in trying to limit the scope of the use of that kind
2 of material, that it is ineffective, that it lays like a cloud
3 over the jury, and when they get in the jury room, even if they
4 don't mention it, it's there. And I think, quite candidly, if
5 that's always the decision of a court, no matter what the age
6 of the conviction -- and you'll remember that the rule says
7 that in an ancient conviction, court has discretion, one way or
8 the other. If you always exercise your discretion for the use
9 on cross-examination, that's an abuse of discretion. I have no
10 idea whether you have or you haven't in the past. Maybe you
11 recall, maybe you don't. And I have -- I would not be able to
12 argue this on the record I have in the circuit because there's
13 no way I can track it, and I'm not going to make an allegation
14 that you've always done that out of ignorance and sheer
15 advocacy. But that is, when a judge always exercises his or
16 her discretion on a particular matter in the same way that --
17 there's an old case, *United States v. Brown*, Second Circuit
18 case -- it must be 30, 40 years old -- that says that that's an
19 abuse of discretion. And I haven't -- I didn't brief it
20 because I don't know what your history is and I decline to
21 presume it. But --

22 THE COURT: I don't know what my history is either,
23 but I don't think it's come up very often.

24 MR. COHN: Well, the government says that there was
25 plenty of evidence to convict him and that, you know, in the

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1 face of that, you should deny the motion just on that. I don't
2 believe that that matters when you've got something as powerful
3 as that. This was a conviction, a 16- or 14-year-old
4 conviction for mail fraud, the same kind of -- although the
5 facts are different, the same kind of crime that was committed
6 here. No jury can ignore that. And so I think the strength of
7 the government's case, which they make a very, you know, potent
8 argument for in their papers, which I assume is their -- going
9 to be their lead on the -- on an appeal, if there is one, I
10 don't think it matters. I think that what -- I don't know that
11 the court will give a judicial recognition to what is in fact,
12 from the defense point of view, is the case, and that is that
13 this is always, always -- no matter what the court tells them
14 and no matter -- and no matter what the government says about
15 it, the limited use of it, it always impacts on the jury.

16 Now there's one other thing. The government didn't
17 even argue his prior conviction. What the government did was,
18 it put in his and his father's convictions together and then
19 argued to the jury that the government's witness, main witness,
20 and the father were both felons and therefore the client had to
21 know about it, that he had the knowledge. The government said
22 that the reason they were putting in his prior conviction on
23 their case in chief was to prove knowledge. I respectfully
24 suggest that that wasn't the case, that they didn't need that
25 to prove the knowledge, given the theory that they had, and

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1 they never mentioned it. They just -- it just lay there. It
2 just lay there like a cloud over the case.

3 THE COURT: It was only admitted for knowledge. It
4 would be limited to knowledge in the case.

5 MR. COHN: I know, but in fact they never argued it.
6 What they argued was -- to prove knowledge was that he knew
7 that his father and the witness, whatever his name is -- I'm
8 blocking it at the moment -- were felons. And they could have
9 gotten that without his conviction. If he was going to
10 testify, I would have actually stipulated that he knew they
11 were both felons, if I was asked to do that, and they could
12 have gotten it from some direct questions with limited answers,
13 which would have been the answers, "Yes, I knew," because he
14 couldn't say he didn't know. So it just sat there. There was
15 no purpose of getting it in except for what I -- with some
16 respect for the government, but not a lot -- I think was a
17 cynical use of the conviction.

18 And that's why I think your Honor should grant a new
19 trial.

20 THE COURT: I haven't heard from the government. Let
21 me hear from the government.

22 MR. COHN: I'm sorry. I can't hear you.

23 THE COURT: I'd better hear from the government.

24 MR. NAFTALIS: Your Honor, the government's position
25 is in its papers, but briefly, we raised the issue before trial

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1 because we sought to admit the conviction for knowledge, and
2 that's what it was admitted for.

3 But even stepping back, the standard is whether the
4 admission of it somehow affected the trial. There's
5 overwhelming evidence that the defendant was guilty. The
6 defendant fronted the issue and, in so doing, made what was to
7 be a knowledge issue a bigger issue of his own making. He lied
8 on the stand and then he was impeached on it. But the question
9 of whether there was knowledge was only what it was admitted
10 for by your Honor, and the impeachment was totally proper,
11 especially given the position the way the defendant attempted
12 to defend and make a bigger issue out of the conviction.

13 THE COURT: I think what Mr. Cohn is saying is that in
14 the summation that the statements made were placed in
15 conjunction in such a way as to possibly connote criminality of
16 all the defendants as opposed to making the distinctions, the
17 evidentiary distinctions that I tried to make in my rulings on
18 admissibility.

19 MR. NAFTALIS: On page 9 of our brief, your Honor --

20 THE COURT: How do you make that argument?

21 MR. NAFTALIS: Mr. Hernandez specifically cabined his
22 arguments with respect to the prior conviction. On page 9 of
23 our brief, we cite the government's closing, and we argued only
24 with respect to knowledge. The defendant's defense was that he
25 did not know that there was a fraud going on around him. Our

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1 argument was, he had previously -- he was in business with
2 criminals, so to argue that he did not have knowledge --

3 THE COURT: Well, doing business with criminals, but
4 that's what criminality is, isn't it?

5 MR. NAFTALIS: Well, that's specifically permitted
6 under 404(b), your Honor. I mean, and that was the instruction
7 you gave, that there could be knowledge. We know that, you
8 know, there was no objection during summation. There was no
9 surprise.

10 THE COURT: I guess there wasn't an objection. The
11 difficult thing is that the type of argument was limited to the
12 evidentiary ruling of the court, and I'm not sure that the
13 argument was made on summations. On the other hand, I don't
14 know that it was something I could have, or should have, I
15 should say, because that's my rule, stepped in to try to
16 correct the possible implications of Mr. Naftalis's stating
17 that. As I hear his argument, his argument is that it was
18 basically an argument that these two guys are criminals and
19 this guy, the defendant has a prior conviction and so they're
20 all just criminals and should be convicted.

21 MR. NAFTALIS: Your Honor, that was not the
22 government's argument. The government's argument was that --

23 THE COURT: Well, how does it read from the summation?

24 MR. NAFTALIS: This is on page 9 of our brief, which
25 is transcript 863 --

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1 THE COURT: I think you have --

2 MR. NAFTALIS: -- to 864.

3 "The next reason that Vadim Chervin knew he was
4 engaged in fraud is that he knew his business partners were
5 felons. Chervin knew his father and Slav Dobrer were felons.
6 On cross-examination Vadim Chervin said he knew Slav Dobrer was
7 a felon but he didn't know what for. Well, he certainly knew
8 he was a felon but he didn't know exactly what -- but he knew
9 exactly what Aron Chervin had been guilty of.

10 "If we go to the next slide, there are two government
11 exhibits, the judgments of conviction for Vadim Chervin and
12 Aron Chervin, and what you see at the very top is Aron Chervin
13 was convicted in the same case as Vadim Chervin. The way you
14 know it's the same case is it's the same case number. They
15 were charged in the same indictment. Aron Chervin was guilty
16 of a conspiracy to commit money laundering, wire fraud, and
17 excise tax evasion, and below it, you see Vadim Bruselovsky,
18 also known as Vadim Chervin, was convicted of wire fraud.

19 "Vadim Chervin admitted that wire fraud is a crime of
20 dishonesty. He knew that his business partners were felons,
21 and at least one of them, his father, was convicted of crimes
22 of dishonesty. Those are the people he chose to work with. So
23 you know that he knew that business partners had these problems
24 in the past, and now he says he was just a biller and that he
25 didn't think there was anything wrong."

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1 That's a very narrow argument, your Honor. And it was
2 really relying on the convictions of the other people.
3 Mr. Cohn is conflating his conviction with the convictions of
4 his co-conspirators, and that's really, you know -- that really
5 is the issue. His conviction was really fronted up by Mr. Cohn
6 in his direct examination, and then it turned into impeachment
7 evidence when he lied. It's the convictions of the other
8 co-conspirators that were really argued during the summation,
9 and there was no error there. They were admitted for
10 knowledge.

11 And your Honor instructed the jury twice -- once
12 during the trial -- and it was crystal clear to them going into
13 the closing, they could only consider it for purposes of
14 knowledge, and then they were instructed again. So we don't
15 think there could have been more caution, and the law says if
16 you've given the proper instructions, there's really nothing
17 wrong.

18 THE COURT: Mr. Cohn? Am I misunderstanding your
19 argument, Mr. Cohn?

20 MR. COHN: Pardon? No, you're not misunderstanding my
21 argument, your Honor. The government has just admitted that
22 his conviction was unnecessary for their argument. And that's
23 the issue. That's why I'm associating it that way. Whether
24 they argue that, you know, in front that they were all
25 criminals together or didn't --

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1 THE COURT: Well, are you arguing that the conviction
2 should not have been admitted or are you arguing that the
3 government went beyond the bounds of the limitation that I
4 placed on its admission in summation?

5 MR. COHN: I'm arguing that it should not have been
6 admitted because of its age, that it had no impact, and that
7 the government's misuse of it infected the trial. That's what
8 I'm saying. The government didn't argue his conviction for
9 what they said it was for, for knowledge. His knowledge was
10 not dependent on his conviction. His knowledge was dependent
11 on Slav Dobrer's conviction for something, and his father's
12 conviction, which he readily admitted he knew. They did not
13 need his conviction to do that. And, you know, I think that
14 the court took the government at its word, which they may have
15 meant at the time until whatever it is that changed it, and
16 said that it was not for that purpose. They were going to use
17 it for knowledge. It had nothing to do with knowledge. It was
18 not necessary for knowledge. It was highly, highly
19 prejudicial, and I believe it infected the entire process.

20 MR. NAFTALIS: Your Honor, Mr. Cohn is misstating the
21 government's position and what happened during the trial. The
22 conviction was admitted for purposes of knowledge. The
23 conviction was not admitted carte blanche. What we argued was
24 very limited. He knew in advance about the conviction and that
25 there was a strategic choice made by the defense to make this a

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1 front and center issue. We didn't even -- the argument made in
2 summation that we're pointing to is about knowledge with
3 respect to similar members of the conspiracy, which is also
4 permissible. This is straight 404(b). There really is just --
5 there's just no issue here.

6 And the ultimate question, your Honor, is whether
7 Vadim Chervin is guilty, and the government proved that beyond
8 a reasonable doubt. There was corroborated evidence that he
9 was not just the biller, that he was in the middle of this.
10 There were wiretaps showing that they were trying to hit a goal
11 of billing, that he -- that he was not just filling out forms
12 blindly. So whether or not we even reach this issue, the first
13 question is whether he's guilty, and he clearly was guilty.

14 THE COURT: I think that is another issue that I've
15 got to address in rendering an opinion here, and that is that
16 in the overall case, in view of the evidence --

17 MR. COHN: I'm sorry. I can't hear you, your Honor.

18 THE COURT: I think as a matter of law, I'm supposed
19 to address: one, should I have admitted the prior conviction;
20 two, having admitted it for the purposes I did admit it, did
21 the government in summation misuse it; and then was the
22 admission of the evidence and the ensuing misuse, if any, so
23 prejudicial as to require a new trial. Those seem to be the
24 issues before the court.

25 MR. COHN: I agree, your Honor.

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1 THE COURT: And my problem is that I tried to avoid
2 the admission question on the prior conviction because I felt
3 that it wasn't clear that by the time the trial came along that
4 you'd take the same position, although you did say you would.
5 But I've been on many trials, and counsel change their
6 positions quite often. So that's the reason I refused to give
7 an advance decision. But then when you opened, it seemed to me
8 that I had to give the limiting instruction when the evidence
9 was presented on the prior conviction that he already had
10 knowledge, and I think it was the correct instruction.

11 Then the issue is whether it was misused. That's one
12 I want to think about, because it does seem to be parsed a
13 little bit from the grounds I admitted it for, in the context
14 that Mr. Naftalis just read off.

15 MR. HERNANDEZ: Your Honor, with the court's
16 permission, could I just address the misuse argument?

17 THE COURT: Yeah.

18 MR. HERNANDEZ: Remember, the case was defended by
19 Mr. Chervin as saying he thought he was involved in the
20 legitimate practice of a biller, he didn't know there was a
21 fraud going on around him. If your Honor goes back to the
22 motion *in limine* briefing from the government, our argument for
23 the admission of the conviction was reliant on many cases to
24 say that when you are a member of a prior conspiracy and then
25 you're charged with similar members, the same members, in a new

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1 conspiracy, the government can argue for knowledge and say,
2 well, one of the reasons the defendant could have known he or
3 she was involved in a crime the second time is because they
4 were convicted in a conspiracy a number of years back. And
5 that I think is quite solid, middle-of-the-road caselaw.

6 THE COURT: Well, it's got to be a conspiracy
7 involving fraud.

8 MR. HERNANDEZ: Well, first of all, that's not a
9 problem here, because they both were fraud conspiracies.

10 THE COURT: I don't think you can just do it on the
11 single conspiracy.

12 MR. HERNANDEZ: That's fine, but that's not an issue
13 here because we have that parallel.

14 So keeping in mind what the caselaw supports and then
15 thinking about what the government's argument in summation was,
16 there's no propensity argument there. There isn't an argument
17 that, well, once a felon, always a felon. There wasn't an
18 argument that, well, they committed fraud, you know, previously
19 and so they probably did it again here. The argument, which,
20 by the way, is two paragraphs out of the entire summation,
21 really sticks to the caselaw on membership of a conspiracy and
22 knowledge and stays right in the middle of the road. It just
23 says, jury, you're going to have to decide knowledge in this
24 case, and Mr. Chervin has told you that he was just an honest
25 guy doing his billing, no idea there was this huge fraud going

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1 on around him. Well, that's not true, ladies and gentlemen,
2 because Vadim Chervin knew that his business partners were
3 felons because they had been, at least one, convicted in the
4 same case, Aron Chervin, for fraud, and he knew that Slav
5 Dobrer was a felon. So when you think about his defense,
6 ladies and gentlemen, that he's just a biller, keep in mind
7 that he knew these facts and that there's much greater
8 likelihood that he knew he was involved in a fraud because he
9 was not dealing with honest businessmen; he was dealing with
10 prior felons. And if you go back, Judge, and read the
11 summation, that is the middle-of-the-road argument, and we were
12 very careful not to make the propensity argument. So in terms
13 of whether it was misused -- and I think there were three
14 instructions on knowledge in this case --

15 THE COURT: I agree that it's not a propensity
16 argument, but whether that propensity instruction by the court
17 should be modified to encompass knowledge of other people, but
18 at the same time you can be a felon. I mean, I have people who
19 are felons before me who were felons in 1961 up in Harlem on
20 cases and ever since have lived perfectly honest lives, as far
21 as I can see.

22 MR. COHN: Excuse me, your Honor. If Mr. Hernandez
23 will sit down, I can probably hear you better. Thank you.

24 THE COURT: I'm sorry. I agree it's not a propensity
25 argument that was made, but the question is whether that

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1 instruction should really be broadened to cover other types of
2 arguments than just propensity.

3 MR. HERNANDEZ: Well, your Honor, you gave the
4 standard instruction that I think is pretty widely approved.
5 Mr. Cohn never asked or objected for a different instruction.
6 I don't even understand his argument to be that the instruction
7 was flawed. I think the argument is more that the conviction
8 never should have come in. And that is really a nonstarter.
9 Mr. Chervin was testifying, so it could be used for impeachment
10 purposes, but also very clearly for knowledge purposes. I
11 mean, it really would be quite a sight to have a defendant, who
12 has a prior fraud conviction in a conspiracy with his father,
13 indicted in a new fraud conspiracy, to then shield that from
14 the jury as if that was not relevant to the defendant's state
15 of mind. I mean, it would really be kind of a remarkable
16 thing, because it really does bear on knowledge and intent.
17 These are not people who Mr. Chervin chose to work with who
18 are, you know, winning awards from the Better Business Bureau
19 every year. These are people who have previously been engaged
20 in fraud. So I just wanted to address the use of the argument.
21 THE COURT: The content of the telephone conversations
22 would be quite indicative of fraud going on by Mr. Dobrer
23 particularly. That's my recollection of the conversation.
24 MR. HERNANDEZ: Right, that's the second half to our
25 argument, which is, remember that the issue here is not whether

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1 your Honor maybe should have added a sentence or two to your
2 instruction or whether this particular piece of evidence under
3 the rules should have been admitted. This is a Rule 33 motion.
4 Manifest injustice. In other words, according to the circuit,
5 was an innocent man convicted. Absolutely not. There's
6 overwhelming evidence based on the conversation that Vadim
7 Chervin knew Dr. Gibbs was not running Total Body, that Vadim
8 Chervin knew that Dr. Gibbs could not be interviewed by GEICO
9 because he couldn't tell the truth, that he had to be coached
10 to lie. Dr. Braddom's testimony about the fraud in billing,
11 there was no good answer or explanation for other than a
12 pattern of intentional fraud to get bills to a particular
13 number. There's no chance that an innocent man was convicted.

14 So whether on the margins the instruction should have
15 been slightly different or not, I mean, there is really no
16 chance, under the extraordinarily high standard of Rule 33,
17 that there should be a new trial.

18 MR. COHN: Your Honor, I've made my argument.

19 THE COURT: It's something I have to think about. I
20 don't want to do it orally.

21 MR. COHN: Very well, your Honor.

22 MR. HERNANDEZ: Thank you, your Honor.

23 MR. COHN: Thank you, your Honor.

24 ooo
25